88-759 (1)

Supreme Court, U.S.
FILED
OCT 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

Case No. _____

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

October Term, 1988

BRET CLARK,

Appellant/Petitioner,

vs.

THE FLORIDA BAR,

Appellee/Respondent.

APPEAL FROM AN ORDER OF THE SUPREME
COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT OF APPELLANT

BRET SHAWN CLARK, ESQUIRE
Appellant/Petitioner
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44pp

QUESTIONS PRESENTED

1. May an attorney who files papers in a court of law seeking judicial review of a matter be sanctioned for doing so on the grounds that the positions asserted therein are frivolous, where there is no legal authority contrary to those positions and in the absence of bad faith on the part of the attorney?

2. Does the order of this Court in Clark v. Florida, 106 S.Ct. 1784 (1986) preclude a subsequent ruling that the issues raised therein are frivolous?

3. May an attorney who alleges that a judge has violated federal law in a lawsuit be sanctioned for doing so

without a finding that this allegation is false, or that the attorney knew the statement to be false, or that the attorney made the statements with reckless disregard for their truth or falsity?

4. Is a rule of ethics which prohibits "conduct that adversely reflects on an attorney's fitness to practice law" void for vagueness or for overbreadth?

5. May the supreme court of a State, which adopts, enforces and adjudicates rules of ethics applicable to attorneys, impose sanctions against an attorney without meeting an initial burden of proof that the attorney had conducted himself in a manner contrary to those rules of ethics?

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REFERENCE TO OPINION BELOW

The Florida Bar v. Clark, 528 So.2d 369 (Fla. 1988)

BASIS FOR JURISDICTION

This appeal is taken from the judgement of the Supreme Court of the State of Florida rendered on July 14, 1988, finding Appellant in violation of the rules of ethics applicable to attorneys admitted to practice law in the State of Florida and imposing certain sanctions against the Appellant. A Notice of Appeal from this order was filed in that court on August 12, 1988. The Court has jurisdiction pursuant to 28 U.S.C. section 1257(2).

In the alternative, Appellant requests that the Court treat the papers upon which this appeal has been taken as a petition for writ of certiorari to the Florida Supreme Court with respect to

the issues raised herein pursuant to 28 U.S.C. section 1257(3).

TEXT OF CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution, amendment I:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people * * * to petition the Government for a redress of grievances.

United States Constitution, amendment XIV, section 1:

> No State shall * * * deprive any person of life, liberty, or property, without the due process of law.

Model Code of Professional Responsibility, Disciplinary Rule 1-102(A)(6) (1981):

> A lawyer shall not * * * Engage in any other conduct that adversely reflects on his fitness to practice law.

Model Code of Professional Responsibility, Disciplinary Rule 7-102(A)(2) (1981):

> In his representation of a client, a lawyer shall not * * * Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

Model Code of Professional Responsibility, Disciplinary Rule 8-102(B) (1981):

> A lawyer shall not knowingly make a false accusation against a judge or other adjudicatory officer.

STATEMENT OF THE CASE

A complaint was filed against Appellant/Petitioner Bret Clark (hereinafter "Clark") in the Florida Supreme Court by the Florida Bar, an executive arm of that court, requesting that sanctions be imposed by the court against Clark for alleged violations of the Code of Professional Responsibility.

The complaint consisted of two counts. The first count alleged that Clark had taken frivolous positions in Clark v. Florida, 106 S.Ct. 1784 (1986). The second alleged that in the course of Clark's representation of a plaintiff in an action commenced in the United States District Court for the Southern District of Florida, Clark made

false accusations against the judiciary. Both counts also included the general allegation of conduct adversely reflecting on Clark's fitness to practice law.

In answer to the complaint and throughout the proceedings, Clark argued that the imposition of sanctions under the facts of the case would be repugnant to the United States Constitution and laws of the United States as a violation of his freedom of speech and right to access to the courts. Clark also argued that this Court's previous ruling in Clark v. Florida precluded a finding that his appeal in that case was frivolous.

A state court judge was appointed by the Florida Supreme Court to act as

referee. A brief hearing on the matter was convened by the judge in his chambers. The Bar subpoeaned no witnesses to testify. In support of the first count, the Bar merely offered into evidence the opinion of former Chief Justice Burger to the Court's memorandum decision dismissing Clark's appeal and denying certiorari. For the second count, the Bar introduced a complaint filed by Clark naming a state court judge as a party to the suit under the civil rights and RICO statutes and an order of the district court dismissing the complaint in part on the grounds of official immunity from suit.

On January 9, 1988, the Referee issued a report, the findings of fact in which were copied virtually verbatim from the

complaint filed by the Bar. The recommendations in the report that Clark be found guilty were copied verbatim from the proposed report prepared by the Bar for the Referee's signature.

As to the first count, after likening the matter to football and hockey games, the Referee faults Clark for "not knowing when to keep one's mouth shut." As for the second count, the Referee held that "the First Amendment does not bar disciplining an attorney for accusations against the judiciary." As to the general allegation regarding Clark's fitness to practice law, the Referee concluded that although Clark was not unfit to practice law, he was "unfit" by "virtue of having been found to have violated Disciplinary Rules

(sic) 1-102(A)(6)." A petition for review of this report was filed in the Florida Supreme Court.

With respect to the first count, Clark argued that no evidence was presented, nor was any finding in the report made that he filed any court papers knowing that the legal positions asserted therein were unfounded in the law, or, in fact, that these positions are not supported in the law. No legal arguments or citations of authority were presented by the Bar to refute any of the positions asserted by Clark nor did any such reference to authority appear in the Referee's report.

Similarly, with respect to the second count, Clark argued that no evidence was presented, and no factual finding was

made that the state court judge named in the suit did not violate the RICO Act, or that the specific facts relied upon to base the claim of liability were untrue, much less that Clark filed the complaint knowing that the allegations were untrue. Clark also pointed out that he had verified facts alleged in support of the complaint, facts which were never proved false by the Bar, by interviewing witnesses and by his own personal observations, and had filed the complaint naming the judge as a party pursuant to an order of a United States District Court Judge.

Clark also argued that the Referee had abdicated his role as a supposedly neutral decisionmaker by imposing no burden of proof on the Bar. As an

example, Clark pointed to the erroneous "fact" established in the report that in Clark v. Florida "the United States Supreme Court denied such appeal as being 'so utterly frivolous as to not warrant any further discussion.'" Thus, Clark argued that there was no evidence to support the imposition of sanctions by the court.

In the alternative, Clark argued that in both counts the Bar clearly sought to impose sanctions based upon the content of words spoken or written by him. The Bar in the first count objected to arguments contained in papers filed during the course of appeal proceedings. In the second count, the Bar sought sanctions for the mere statement that a judge had violated a

federal statute. Additionally, Clark argued that in both counts the Bar sought sanctions to unreasonably restrict his and his client's access to the courts.

In neither instance did the Bar even attempt to show that the sanctions to be imposed for the exercise of these fundamental rights furthers a compelling state interest. Accordingly, Clark reiterated his argument that to impose such sanctions would be unconstitutional, and that the imposition of sanctions for conduct "adversely reflecting on his fitness to practice law" was void for vagueness and overbroad as such sanctions were applied to protected activity.

On July 14, 1988 the Florida Supreme

Court approved the report of the Referee, again reprinting in full the "findings of fact" contained therein that were copied almost verbatim from the Bar's complaint. Without citation to any legal authority, the court rejected Clark's arguments as to the constitutionality of the disciplinary rules under which the court imposed sanctions against him. The court publicly reprimanded Clark in an opinion to be printed in the Southern Reporter and entered judgment for costs in the amount of $467.15.

The appeal is from this order.

REASONS THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION BY THE COURT

This appeal presents important issues concerning the proper relationship between attorneys and the judiciary. The five questions presented for review involve issues of federal law which have not previously been passed upon by this Court, the resolution of which will have an enormous impact on the administration of justice in the courts throughout the country.

1. Sanctions for "frivolous" Positions. This Court has held that restrictions on access to the courts may be invalid in certain circumstances. See, Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780 (1971), Roadway Express, Inc. v. Piper, 447 U.S. 752,

766-767 (1980). The issue presented in this case is under what circumstances does the imposition of sanctions for filing "frivolous" papers amount to a denial of access to the courts or of freedom of speech.

The scope of a court's power to sanction an attorney or a party merely for asserting a position with which that court does not agree is of particular importance in light of the increase in litigation caused as a result of the amendments to Federal Rule of Civil Procedure 11, relevant provisions of which are virtually identical to the disciplinary rule under which sanctions were imposed against Clark.

Although preventing abuse of the legal system is a laudable objective, the

Court should closely scrutinize methods of doing so which impinge upon the free interchange of ideas and which may serve to restrict colorable, albeit unusual, claims of right sought to be vindicated in a court of law. As revealed by the facts in this case, these methods create the temptation to impose sanctions by overzealous jurists, particularly when the positions for which sanctions are imposed are critical of the judiciary.

In addition, the unrestricted imposition of sanctions by the courts has resulted in an increase in litigation over the propriety thereof and has a chilling effect on the creativity of advocates. These unintended results are counterproductive to the purpose of sanctions and will

result in the stagnation of the law as advocates are deterred from arguing novel theories of law.

The Court must resolve the serious and important questions as to the validity of sanctions imposed by a court against an attorney or a party for positions that are not clearly contrary to existing law and in the absence of bad faith or some improper motive on the part of that attorney or party.

2. Issue Preclusion. The Court has established concepts of finality designed to prevent relitigation of issues previously decided. This appeal presents an important question of the extent to which an opinion of one Justice concurring in the dismissal of an appeal for want of jurisdiction and

denial of certiorari that is not joined in by the other members of the Court has issue preclusion effect in litigation directly related to the subject matter of the concurring opinion.

In United States v. Kras, 93 S.Ct. 631, 637 (1973), the Court relied for its decision, in part, on dissents to the denial of certiorari by Justice Douglas in previous cases, and the failure of Justice Harlan to join in those dissents as an indication of the Court's "attitude" on the issue at hand. Similarly, in this case, the fact that not a single Justice of the Court joined in the seperate opinion filed by former Chief Justice Burger in Clark v. Florida indicates that the Court as a whole did not view the positions taken

by Clark as frivolous.

Yet the Florida Supreme Court in its opinion below cited the Court's memorandum decision in Clark v. Florida for the proposition that the appeal in that case was denied as "so utterly frivolous as to not warrant any further discussion." The Florida court obviously misinterpreted this decision, as the memorandum opinion merely held that the appeal be dismissed for want of jurisdiction and denied certiorari. 106 S.Ct. 1784. Indeed, the fact that the appeal was dismissed for want of jurisdiction, not for lack of a substantial federal question, reinforces the conclusion that the issues presented in the appeal were not considered by the Court to be frivolous. See, Hopfman v.

Connolly, 105 S.Ct. 2106 (1985).

Ironically, in the instant case, additional litigation over the proceedings in Clark v. Florida was initiated by the Supreme Court of Florida, obstensibly as a sanction to prevent a continuation of unwarranted litigation. In the process of prolonging litigation of this matter, the lower court not only misrepresented the holding of this Court, but erred by, in essence, failing to adhere to that holding. Thus, resolution of the question of issue preclusion raised in this case will provide guidance to courts applying the doctrines of finality and to the proper interpretation of this Court's rulings.

3. Sanctions for "False" Accusations. This case also presents critically important questions as to the applicability of the standard of proof established for defamation cases in New York Times v. Sullivan, 376 U.S. 254 (1964) to attorney discipline and other cases. See, Garrison v. Lousiana, 85 S.Ct. 209 (1964), modified in Curtis Publishing Co. v. Butts, 87 S.Ct. 1975 (1967).

The imposition of sanctions against an attorney merely for filing a suit naming a judge as a defendant, pursuant to an order of a United States District Court, is a grave matter requiring a full review by this Court. As with any other governmental entity, the judiciary may not restrict speech simply because that

speech is critical of the judiciary. Contrary to the purported objective of maintaining confidence in the judiciary, such a rule creates the impression of a dictatorial institution intolerant of dissent, and eschews less drastic means of achieving this end.

Under the facts of this case, the imposition of sanctions against an attorney for making what amounts to an expression of an opinion as to the legal effect of the uncontroverted acts of a judge does not further a compelling state interest. But even if the Court were to find such a compelling interest, the exercise of such unbridled power of censorship by the courts must at least be required to meet the strict standard of proof applicable in defamamtion and

similar cases.

Clark has been sanctioned by the Florida Supreme Court for making statements that the acts of a judge were in violation of federal law. No finding was made that these statements were made knowing that they were false, or that they were made with reckless disregard for the truth or falsity of the statements. In fact, no evidence was presented that these statements are false, and no specific finding was made either that these statements or the facts upon which they were based are untrue.

Resolution of the issue as to whether sanctions may be imposed against an attorney under these facts will have an important impact on the continued

restriction of speech critical of the judiciary from those members of the public in the best position to make such statements.

4. Vagueness and Overbreadth. In reviewing state laws neutral on their face but applied to restrict protected speech, the Court has held such laws unconstitutional as either overbroad or void for vagueness. In this case Clark has been sanctioned for speech characterized as "adversely reflecting on his fitness to practice law."

As such, this and similar disciplinary rules are void for vagueness and overbroad. For the same reasons that the issue of the judiciary's power to restrict freedom of speech is an important question which this Court must

resolve, so too must the Court review the vagueness and overbreadth issues here presented.

5. Due Process. Finally, this case presents a question that goes to the heart of the attorney disciplinary system itself. As with most states throughout the country, the Supreme Court of Florida has promulgated, or "legislated" rules of ethics for attorneys, initiated or "enforced" these laws through its executive arm, The Florida Bar, and then adjudicated specific cases brought to the Supreme Court by the Bar.

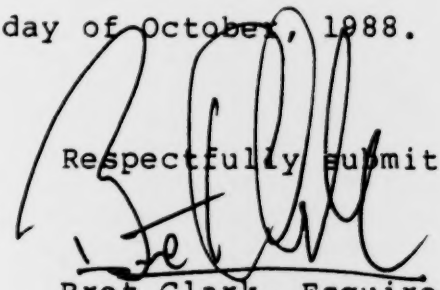
In the instant case, Clark was prosecuted, tried and found guilty by a judicial body that created the laws under which he was sanctioned. Such an

inherently unfair system of discipline allowed for the imposition of sanctions against an attorney for activity protected by the constitution in proceedings wherein the government was not even required to meet a burden of proof as to the allegations made against Clark through the introduction of substantial competent evidence.

The facts of this case raise significant questions about the fundamental fairness of such an attorney disciplinary system. As with the other issues presented by this case, the resolution of these questions are of special importance to this Court because of their enormous impact on the administration of justice in the courts throughout the country, and are of

significance to the continued effectiveness of Appellant/Petitioner as an advocate and participant in that legal system.

Dated this 3rd day of October, 1988.



Respectfully submitted,

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SUPREME COURT OF FLORIDA

No. 70,295

THE FLORIDA BAR, Complainant,

vs.

BRET S. CLARK, Respondent.

[July 14, 1988]

PER CURIAM.

This cause is before the Court for consideration of the findings and recommendations set forth in a referee's report. Respondent has filed a petition for review. We have jurisdiction. Art. V, section 15, Fla. Const.

The referee made the following relevant findings of fact:

COUNT I

. . . .

2. That . . . Respondent received a speeding ticket to which he pled not guilty.

3. That . . . Respondent was found guilty of such speeding ticket . . . and fined $100.00. . . . .

6. That on or about September 4, 1984 the Circuit Court, Fifth Judicial Circuit, in and for Lake County, Florida, sitting in its appellate capacity, affirmed the Lake County Court decision [imposing the fine], without opinion.

7. That on or about February 14, 1985 Respondent filed a petition for writ of certiorari with the Fifth District Court of Appeal of Florida to review such September 4, 1984 order of the Circuit Court.

8. That pursuant to Florida Rule of Appellate Procedure 9.100(c), such petition for writ of certiorari should have been filed within 30 days of the order sought to be

reviewed, or by October 4, 1984 in the instant case.

9. That Respondent argued such petition was timely under an exception to the rule where denial of appellate review would be fundamentally unfair.

10. That Respondent contended such denial of appellate review would be fundamentally unfair since Respondent had not received notice of the Fifth Judicial Circuit's order of affirmance until January 14, 1985.

11. That Respondent's failure to receive such notice was due to his change of address and failure to inform the court of such change.

12. That on or about April 15, 1985 the Fifth District Court of Appeal dismissed Respondent's petition for writ of certiorari due to lack of jurisdiction.

13. That on or about April 30, 1985 Respondent filed a motion for rehearing with the Fifth District Court of Appeal of Florida.

14. That on or about May 28, 1985 the Fifth District Court

of Appeal denied such motion as untimely.

15. That Respondent had errroneously assumed that all documents served by mail have an additional five days added to the time period whereas such procedure is not applicable to the filing [sic] notices of appeal or motions for rehearing.

16. That on or about July 8, 1985 Respondent filed a motion to recall mandate and a suggestion for reconsideration with the Fifth District Court of Appeal.

17. That such motion was attacked by the State as being frivolous and a sham pleading since the Court had no power to recall mandate and that no mandate had even issued.

18. That the State moved for attorneys fees under the provisions which provides for such fees where a losing party's position lacks any "justicable issue" of law of [sic] fact.

19. That in support of Respondent's contantion that his efforts were not frivolous, Respondent relied on a 1980 case that had been

reversed by the Florida Supreme Court in 1981.

20. That on or about July 12, 1985 the Fifth District Court of Appeal denied Respondent's motion for recall of mandate.

21. That on or about July 25, 1985 the Fifth District Court of Appeal granted the State's Motion for Attorneys Fees in the amount of $100.00.

22. That on or about August 23, 1985 Respondent filed an untimely motion with the Fifth Ditsrict Court of Appeal to review such order granting attorney's fees.

23. That Respondent argued, for the first time, that such sanctions were in retaliation for Respondent's correspondence to the Fifth District Court of Appeal where Respondent complained of his denial of appellate review as violating his First Amendment right to petition the government for redress of grievances and that such fee sanction was repugnant to the Constitution.

24. That on or about September 12, 1985 the Fifth District Court of Appeal

summarily denied Respondent's Motion to Review such fee award.

25. That on or about November 14, 1985 the Florida Supreme Court, answering an inquiry made by Respondent, informed Respondent that it lacked jurisdiction to review orders granting fee awards.

26. That on or about December 9, 1985 Respondent appealed the Fifth District Court of Appeal's final order awarding fees to the United States Supreme Court, arguing that such fee award was in violation of the First Amendment since such fee statute was based upon a vague concept of what constituted a justicable issue.

27. That on or about April 28, 1986 the United States Supreme Court denied such appeal as being "so utterly frivolous as to not warrant any further discussion." [106 S.Ct. 1784]

Count II

28. That on or about April 25, 1985 Respondent appeared before the Honorable Judge

Spellman as plaintiff's attorny in a preliminary injunction hearing, in the case of Rose Merle v. Florida State Constructors Services, Inc., Case No. 85-0974-Civ-EPS, in the U.S. District Court, Southern District of Florida.

29. That at such heraing, respondent alleged that Judge Barad, a Circuit Judge of the Eleventh Judcial Circuit of Florida was an active participant in a RICO conspiracy with defendants.

30. That Respondent based such allegations on the premise that Judge Barad and the defendants in the case being tried had entered into a conspiracy which resulted in obstruction of justice and the inabiiity of Respondent's client to get a fair hearing before such Judge.

31. That on or about April 21, 1986 Respondent filed a Second Amended Complaint-Class Action against the Honorable Frederick Barad and the entire Eleventh Circuit Court of Dade County, Florida, among other defendants.

32. That in such complaint, Respondent alleged that Judge

> Barad and other judges of the Eleventh Circuit Court were corruptly influenced in the due administration of justice in the state courts by the private defendants, thus engaging in a pattern of racketering activity in violation of the RICO statute.
>
> 33. That Respondent based such allegations of racketeering activity on Judge Barad's rulings against Respondent's client and ex parte communications had between Judge Barad and opposing counsel.

The referee determined that respondent had violated the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: Rules 1-102(A)(6)(conduct that adversely reflects on an attorney's fitness to practice law); 7-102(A)(2) (advancement of a claim or defense that is unwarranted under existing law); and 8-102(b)(a lawyer shall not knowingly

make false accusations against a judge or other adjudicatory officer).

Respondent takes issue with the referee's findings and asserts that the Bar seeks to violate his first amendment rights and rigth of access to the court system. We agree with the referee in rejecting these claims. Curtailing respondent's abuse of the court system does not deny him access to the courts or violate his constitutional rights. As the referee noted:

> [F]rom the outset of Respondent's trek through the legal system to fight a traffic ticket he has forged ahead despite failing to comply with simple rules of procedure. To begin, he petitioned for certiorari to the Fifth District Court of Appeals five months subsequent to the date of the order. The Rules of Appellate Procedure

> unequivocally provide that the petition be filed within 30 days. Although Respondent changed his address and failed to advise the court of same, he persisted undeterred. Respondent then filed a Motion for Rehearing outside of the time limits prescribed, mistakenly believing he had extra time for mailing. Although Mr. Clark claims this mistake to be common among other attorneys he should have at that point ceased his efforts. He had failed to comply with mandatory rules which all attorneys and litigants are bound by. The Fifth District Court of Appeals recognized the foregoing and consequently awarded the Attorney General's Office attorney's fees. . . .
>
> It is most certainly admirable to be a persistent, aggressive and innovative practitioner. It is not admirable, however, to adavnce frivolous claims where simple mandatory rules of procedure are disobeyed.

We likewise reject respondent's assertion that by charging him with a violation of Rule 8-102(b), the Bar is

preventing him from discharging his ethical duty to advise the public of judicial wrongdoing. Respondent is being sanctioned, not for exercising his right to criticize the judiocairy but for making false and unsubstantiated charges against the judiciary.

We accept the referee's recommendation and publically reprimand respondent.

Judgment for costs in the amount of $467.15 is hereby entered against respondent for which sum let execution issue.

It is so ordered.

EHRLICH, C.J. and OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BRET S. CLARK,

Appellant/Petitioner,

v. NOTICE OF APPEAL

THE FLORIDA BAR,

Appellee/Respondent.

_____/

Notice is hereby given that BRET S. CLARK, the appellant above-named, hereby appeals to the United States Supreme Court, from the judgment of the Court imposing sanctions against appellant in a disciplinary proceeding entered on July 14, 1988, in its entirety. Appeal therefrom is taken pursuant to 28 U.S.C. section 1257(2).

I DO HEREBY CERTIFY that a true and correct copy hereof was caused to be

served by mail this 9th day of August, 1988, upon Randi Lazarus, Esquire, Suite 211, 444 Brickell Avenue, Miami, Florida, 33131.

Respectfully submitted,

/s/

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86-118.19